

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 339**

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on August 7, 2007 when Claimants M. R. Romero and D. L. Silva were dismissed for alleged violation of Maintenance of Way Operating Rules 1.6-Conduct and 1.13-Reporting and Complying with Instructions, and Maintenance of Way Safety Rule S-1.3.1-Requirements for alleged failure to comply with instructions concerning welding procedures; alleged failure to use required personal protective equipment; and alleged inappropriate conduct when receiving instructions concerning same; and
2. As a consequence of the violation referred to in part 1 the Carrier shall immediately return the Claimants to service with seniority, vacation and all other rights unimpaired, remove any mention of this incident from Claimants personal records and make Claimants whole for all time lost commencing June 28, 2007, the date Claimants were initially withheld from service pending investigation.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On June 29, 2007, the Carrier wrote a joint letter to Claimants Romero and Silva advising an investigation was being convened:

"...to develop the facts and place responsibility, if any, in connection with

possible violation of Rules 1.6 and 1.13 of Maintenance of Way Operating Rules effective October 31, 2004, and Rule S-1.3.1 of the Maintenance of Way Safety Rules, in effect October 30, 2005, as supplemented or amended, concerning your alleged failure to comply with instructions concerning welding procedures, your alleged failure to use required personal protective equipment and your alleged inappropriate conduct when receiving instructions concerning same while working as welders on June 28, 2007, Seligman Subdivision.

You are withheld from service pending the results of this formal investigation."

On August 7, 2007, the Carrier advised both Claimants in a joint letter that they were dismissed from service.

The Carrier assigned a Supervisor to oversee the welding operation. Where problems were found he was to work with the welders. While welding switch points, the welders first have to grind out the cold cracks then build the frog points up to the Carrier's standard.

The Carrier's first witness was a relief Roadmaster in charge of the territory wherein the alleged violations occurred. He testified to what the Senior Welder overseeing the work of the Claimants who were working as a team. He related what the Senior Welder told him on the phone, but most of the testimony was secondhand.

The Acting Roadmaster drove to the scene. He testified as to what he saw. He stated he saw Claimant Romero was grinding but his face shield was up. It should have been down and he should have had his goggles on. He only had his safety glasses on. Claimant Silva was acting as a lookout but was within three feet of Romero. Silva was not wearing his leg protectors. Sparks from the grinder were thrown in his direction. He could have suffered leg burns. The Acting Roadmaster shut down the Claimants' operation and directed them away from any potential injury.

The testimony of the Senior Welder on site who was instructed to work with and oversee the welding being done by the Claimants is convincing.

Regarding the failure to wear (PPE) personal protective equipment, the Senior Welder testified that Silva was grinding without protective leggings. When told he needed his leggings on, he was in a crouched position. He stood up, looked at the Senior Welder, dropped the grinder that was still on from roughly a two foot height and walked away.

Regarding Claimant Romero, when he was grinding the Senior Welder pointed out that they had not ground all the cracks out. Claimant Romero stood up and threw the welding chair on the field side of the track which ended up behind the welding truck.

Insubordination can be a loud in-your-face reaction to some instructions, or it can be subtle, like not responding to instructions.

When Claimant Silva had to be told twice to get his leggings on, he was insubordinate. When Claimant Romero, after being told there still existed a crack in the switch point that had to be ground out, threw the welding chair behind the welding truck, it was an insubordinate act.

Clearly, both Claimants are guilty as charged. The Carrier clearly established each Claimant's culpability for the charges assessed.

The dismissal is not out of line. Throwing tools (including the special chair), requiring instructions to be restated, and failure to wear PPE gear were clearly established.

Each Claimant was relatively new to the system, especially to the welding process.

Under the circumstances, this Board can find no redeeming qualifications to either sustain the claim in its entirety or to change the dismissals to long suspensions.


AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


David D. Tanner, For the Employees


Samantha Rogers, For the Carrier

Dated: 3/27/07